Supreme Court, U.S.
FILED

(1)

No. 93-7795 JAN 24 1994

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIAM EVANS-SMITH,

Petitioner,

V.

JOHN B. TAYLOR, WARDEN STAUNTON CORRECTIONAL CENTER,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the materiality test set forth in this Court's decision in U.S. v. Bagley, 473 U.S. 667 (1985) or the harmless error test set forth in Giglio v. United States, 405 U.S. 150 (1972), apply to the consideration of a due process claim based upon the prosecution's withholding of exculpatory evidence in violation of a trial court order for in camera inspection of such statements, coupled with prosecutorial use of similarly acquired non-exculpatory evidence at trial to convict.

2. Under a scheme in which the jury recommends the appropriate sentence, which may not be exceeded by the trial judge, is exculpatory evidence which might have created residual doubt as to guilt material?

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1993

NO. _____

WILLIAM EVANS-SMITH

Petitioner

v.

JOHN B. TAYLOR, WARDEN,
STAUNTON CORRECTIONAL CENTER

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE SUPREME COURT OF VIRGINIA

The Petitioner, William Evans-Smith, respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the Supreme Court of Virginia, entered in the above-entitled proceedings on October 26, 1993.

OPINIONS BELOW

The unpublished order by the Supreme Court of Virginia denying Petitioner's petition for appeal is reprinted in the Appendix. (App. 1A)[1] The trial court's order, letter opinion denying Petitioner's request for Writ of Habeas Corpus, and order denying reconsideration of said denial are also reprinted in the Appendix. (App. 2B, 4C, and 49D).

STATEMENT OF JURISDICTIONAL GROUNDS

The Supreme Court of Virginia denied Petitioner's appeal on October 26, 1993 from the Loudoun County, Virginia Circuit Court denial of his petition for Writ of Habeas Corpus. This Court has jurisdiction pursuant to 28 U.S.C. Sec. 1257.

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[1] Materials cited as "App. 1A" and following are contained in the Appendix under separate cover.

APPLICABLE PROVISIONS OF LAW

1. Sections 8.01-654, 18.2-10, and 18.2-32 of the Code of Virginia, as amended, are reprinted in pertinent part in the Appendix. (App. 51E, 56F and 55F).

2. The Fifth and Fourteenth Amendments to the Constitution of the United States are reprinted in the Appendix. (App. 57G and 58H).

STATEMENT OF THE CASE

A. The Proceedings Below

On April 23, 1985, a special grand jury sitting in Leesburg, Virginia, for the Circuit Court of Loudoun County directly indicted William Evans-Smith, charging him with the second degree murder of his wife, Barbara H. Evans-Smith, in violation of Section 18.2-32 of the Code of Virginia, as amended. On August 30, 1985, a jury verdict of guilty was

returned against Evans-Smith, and on January 16, 1986, he was sentenced to serve five years in the Virginia Department of Corrections.

Evans-Smith successfully appealed this conviction and the case was remanded for retrial at the Commonwealth's discretion. Evans-Smith v. Commonwealth, 5 Va. App. 188, 361 S.E. 2d 436 (1987).

Evans-Smith was retried on April 17, 1989, convicted, and sentenced by the trial court on August 11, 1989, consistent with the jury recommended verdict of 20 years. The Petitioner is presently serving said increased sentence in the Virginia Department of Corrections located in Staunton, Virginia.

Evans-Smith's petition for direct appeal was denied by the Virginia Court of Appeals on June 1, 1990, rehearing denied

on June 17, 1990, and by the Supreme Court of Virginia on September 14, 1990.

On March 29, 1991, Evans-Smith filed pursuant to Section 8.01-654 of the Code of Virginia, as amended, a petition for Writ of Habeas Corpus in the Circuit Court of Loudoun County, asserting that he was denied his constitutional right to a speedy trial. This petition was dismissed by the trial court on May 2, 1991, and the appeal was denied by the Supreme Court of Virginia on November 21, 1991.

A petition for a Federal Writ of Habeas Corpus was filed concerning issues of sufficiency of evidence, harsher sentencing, and a juror issue, which petition was denied by the U.S. District Court, Eastern District of Virginia, Alexandria Division, on February 28, 1992. However, Petitioner's appeal to the United

States Court of Appeals for the Fourth Circuit, is pending. A certificate of probable cause to appeal was granted May 13, 1993, and oral argument was heard December 9, 1993.

Petitioner filed a second state petition for Writ of Habeas Corpus on May 14, 1992, which petition is the subject of this petition for Writ of Certiorari. This habeas petition alleged that Evans-Smith was denied his constitutional right to due process by the Commonwealth's suppression of exculpatory evidence and/or because of newly discovered evidence. The petition was based upon the discovery by the defense of a previously unknown witness, Karen Spalding, who affied (App. 59I) that on the morning of the murder in question, between the hours of 7:30 a.m. and 8:00 a.m., she observed a suspicious,

blond haired man walking on Route 725 near the Evans-Smiths' farm gate as she passed that way by vehicle when taking her daughter to Lincoln Elementary School. She further affied that she was stopped during the April 16, 1985, road check by sheriff investigator Jay Merchant and was questioned about her observations the day before, and remembering later that day she had seen this suspicious man, she relayed the information to Merchant by telephone.

Respondent's initial response to this petition was a motion to dismiss, filed with an affidavit of Merchant (App. 64J). Merchant declared that his notes reflected a conversation with Spalding during the road check, and that he had **"no present recollection of a subsequent telephone call from Mrs. Spalding, and no notes or memoranda of such a telephone**

conversation." Moreover, Merchant affied that photostatic copies of his "notes from the road check, includng [sic] my note of my conversation with Mrs. Spalding and her full name, address, and telephone number, were given to Evans-Smith's defense counsel before trial pursuant to a discovery order of this Court."

At a trial court hearing held July 8, 1992, on the State's motion to dismiss, the Respondent's premise was that the circumstances of this case did not fall into the category of suppression of "exculpatory evidence," but that at best it was evidence that had not been preserved by the Commonwealth, arguing that habeas relief could only be granted upon the Petitioner's showing of bad faith on the part of the prosecution. In response, Petitioner filed an amended

habeas petition on July 29, 1992, (App. 69K), asserting a third basis for relief that the evidence purported to be "lost" by the investigator was lost due to bad faith on the part of the police, listing fifteen similar actions by police investigators in Petitioner's prosecution, reflecting a pattern of bad faith.

Respondent filed an amended answer to the amended petition, revealing that Merchant, **upon further review of his notes, found a notation (no more than five pages after the first entry in a relatively small notebook) of a call to Spalding he made on April 16, 1985**, which notes cryptically indicated that she reported seeing a white male with a reddish beard in his late twenties or early thirties, who was wearing a jean jacket, blue jeans, and a baseball hat,

and walking in the direction of Lincoln on the road passing the Evans-Smith's entrance gate on the Thursday or Friday before the murder. At a hearing held September 1, 1992, the Respondent joined in the Petitioner's request for hearing and **further represented to the trial court that it did not have any evidence that Merchant's road survey notes had in fact been disclosed to the defense.**

On January 12, 1993, a trial court hearing was held on the limited issues in the first two issues raised by the petition, i.e., suppression of exculpatory evidence and after discovered evidence. Upon hearing evidence, submission of exhibits, and argument of counsel, the trial court in its February 1, 1993, letter opinion made the following findings of fact concerning the criminal discovery

process in Commonwealth v. Evans-Smith, Criminal No. 4700 (App 14C-21C):

> "On May 3, 1985 defense counsel filed a discovery motion which included in paragraphs 2 and 3 thereof requests for exculpatory evidence under Brady vs. Maryland, 83 S.Ct. 1194 (1963) (Petitioner's Exhibit 4).
>
> "A hearing was held before Judge Carleton Penn on May 16, 1985 which concerned the defense discovery motion. From the representations of defense counsel to the Court at the hearing the Commonwealth was clearly aware that the defense knew that the Commonwealth had interviewed over fifty persons; the defense's investigation indicated that some of those persons had stated things that would not support the Commonwealth's theory of the case; that the defense was aware that the Commonwealth's case was entirely circumstantial; that the defense's theory was that person or persons other than Evans-Smith committed the murder; that the defense saw that the Commonwealth's investigation had narrowly focused only on Evans-Smith; and that the defense needed to follow up on exculpatory evidence right away.
>
> "As a result of that hearing the Court ordered the Commonwealth to produce exculpatory evidence, and ordered further that if there was any

doubt as to whether or not evidence was exculpatory, then it shall be presented to the Court for in camera inspection. See order entered 23 May 1985, Petitioner's Exhibit 6. It was to be a continuing order. The Court asked the Commonwealth to file its theory of the case confidentially with the Court to be used by it in inspecting any statements in camera.

"On May 16, 1985 trial was set to commence on August 13, 1985.

"The Commonwealth filed a written discovery response on May 23, 1985 which produced statements of the Petitioner, but not anyone else, and an "Answer to Motion for Exculpatory Evidence" which stated:

> 'None known to the Commonwealth at this time.'
>
> 'Pursuant to Court order all witness statements will be presented to the Court for in camera inspection.' (Petitioner's Exhibit 8)

"The Petitioner had hired his own private investigators to help him in his defense. The defense acquired information that two individuals had provided the Commonwealth with the reports of suspicious incidents close in time and place to the murder. As a result, a further discovery motion was filed on August 2, 1985 (Petitioner's Exhibit 9).

"A hearing was held before Judge Penn on August 5, 1985. He considered it to be an in camera pre-trial conference and excluded the public. Before the hearing Judge Penn had received from the Commonwealth its theory of the case as well as certain data of the knowledge of witnesses that could arguably be exculpatory. When Mr. Howard raised the issue of the defense's desire to have the Commonwealth produce "any reports regarding suspicious activity of vehicles and persons" (Transcript page 24, Petitioner's Exhibit 10), Judge Penn immediately went into reviewing approximately ten written reports of statements of persons previously supplied by the Commonwealth for in camera inspection. The Court ruled all these reports to be exculpatory and gave them to the defense. At least one of the statements concerned suspicious events that occurred approximately two weeks prior to the murder (the "Gefaell Statement" - see page 2 of Petitioner's Exhibit 12).

"Defense counsel brought up other information that had come to their attention about suspicious activity and its being reported to the Sheriff's Department. Judge Penn suggested that the defense ask for a subpoena duces tecum directed to the Sheriff's Department. The defense followed his suggestion.

"On August 8, 1985 a hearing was held before Judge Penn on the petitioner's request for a subpoena duces tecum to the Sheriff's Department for reports of suspicious vehicles and persons from March 15, 1985 to April 20, 1985. At the hearing Judge Penn ordered the production of all memoranda concerning statements made by Tracy Dillon and Elaine Monroe for in camera inspection and that the subpoena duces tecum be issued in usual form returnable the first day of trial, August 13, 1985.

"Evans-Smith's first trial commenced on August 13, 1985. On August 30, 1985 the jury found him guilty of second degree murder and fixed his punishment at five years in the penitentiary. He was sentenced, but his conviction was reversed by the Court of appeals on October 20, 1987. Evans-Smith vs. Commonwealth, 5 Va. App. 188 (1987).

"The Commonwealth decided to retry Evans-Smith. On January 11, 1988 the Petitioner filed a discovery motion which included a request for exculpatory evidence under Brady. (Petitioner's Exhibit 14). On January 21, 1988 the Commonwealth filed a written response stating:

> 'The Commonwealth is unaware of any evidence subject to the rules of discovery which was not provided or made known to the

defense either prior to or during the first trial of this case.' (Petitioner's Exhibit 15).

"The Commonwealth filed two supplemental discovery responses (Petitioner's Exhibits 16 and 17) but each concerned only statements of the Petitioner.

"This Court granted a suppression motion filed by the Petitioner. The Commonwealth appealed, and the Court of Appeals reversed. After the delay caused by this appeal, the second trial started on April 17, 1989. The jury returned its verdict on April 27, 1989.

"At no time did the Commonwealth reveal to the Petitioner or any of his attorneys the existence of Spalding's statements to Merchant on April 16, 1985. At no time did the Commonwealth produce any memorandum or notes of her statements to the Court for in camera inspection and ruling. Evans-Smith did not learn of Spalding's statements until May 1992." [Emphasis Added.] Letter Opinion, William Evans-Smith v. Taylor, Law No. 13577 (February 1, 1993).

The trial court, however, denied and dismissed all three claims in Petitioner's

Amended Writ of Habeas Corpus for the following stated reasons (App. 4C-5C):

> "(1) Even if the information given to Investigator Jay Merchant ("Merchant") by Karen Spalding ("Spalding") on the morning after the murder is considered after-discovered evidence, no relief is available under Fitzgerald vs. Bass, 6 Va. App. 38 (1988) because after-discovered evidence does not constitute a basis for habeas relief;
>
> "(2) The information given to Merchant by Spalding is clearly exculpatory evidence, but under United States vs. Bagley, 105 S.Ct. 3375 (1985) such evidence is not material; and
>
> "(3) The information given by Spalding to Merchant is exculpatory evidence coming under the doctrine of Brady vs. Maryland, 83 S.Ct. 1194 (1963) and its progeny and is not evidence, potentially useful to the defense but lost due to the bad faith of the police, under the doctrine of Arizona vs. Youngblood, 109 S.Ct. 333 (1988)."

On June 8, 1993, Petitioner filed a timely motion for reconsideration of the trial court's denial of his petition, presenting the arguments raised in this

Petition for Writ of Certiorari. The motion was denied by Order entered on June 14, 1993. (App. 49D). Petitioner timely appealed the denial of the requested Writ of Habeas Corpus to the Supreme Court of Virginia, raising the same constitutional challenges presented in this petition. On October 26, 1993, the Supreme Court of Virginia refused the petition for appeal in an unpublished decision. (App. 1A).

B. The Facts In This Case

On April 27, 1989, William Evans-Smith was convicted on wholly circumstantial evidence for the second time of the murder of his wife Barbara Evans-Smith. Mrs. Evans-Smith had been murdered in the couple's rural home on April 15, 1985, sometime between 4:00 a.m. and 8:00 a.m. Her autopsy revealed that she had died by strangulation, 30 to 60

minutes after last eating food consisting of vegetable or fruit material and seed topping commonly found on bread. The autopsy further revealed a subdural hematoma on the back of her head.

The Evans-Smiths' daughter, Lesleigh Cook, arrived at her parents' home about 11:00 a.m. that morning. When she entered the house, she noticed that one of her parents' dogs was closed in the entrance/utility room off the kitchen. Upon entering the kitchen, Cook found the kitchen table askew, a hutch pulled away from the wall, and one of her mother's slippers on the kitchen floor. After calling for her mother and getting no answer, Cook went into the hallway where she found the front door partially open, the hall table overturned, and her mother's other slipper. After calling out

again and not getting an answer she became so afraid she left the house the way she had come in. Cook testified that while driving down the driveway she called a friend, William Laycock, for help on her Citizens Band Radio. Cook drove to the entrance of the quarter mile long driveway and waited there for Laycock, who arrived with a friend, Robert Brown.

Brown found the victim in a second floor bedroom of the Evans-Smith home on the shag carpeted floor between the victim's bed and the door to the bathroom. A pair of panty hose was wrapped around her neck three times and knotted on the left front just below her jaw. Still dressed in her bed clothes, her robe was open, and a pair of panties placed in her mouth. Her bedroom was ransacked and

cluttered with items from closets and drawers.

In the Petitioner's bedroom, which was adjacent to the victim's bedroom (through an adjoining bathroom), the contents of two bureau-top boxes were found on the bed. There were two or three neckties on the floor of the closet, as well as a pair of slippers that were out of place. The rest of the house did not appear to have been ransacked.

In addition to the displaced furniture in the kitchen, crime scene technicians found what appeared to be two parallel "scratch marks" in the linoleum floor. There was one set of dishes on the kitchen table, with a birthday card, glasses case, address book, and a copy of that day's Washington Post newspaper. Another set of dishes was found in the

kitchen sink. The table in the hall-way at the foot of the stairs leading up to the bedrooms was overturned. An arrangement of silk flowers in a basket was lying on its side, with little or no debris from the flowers on the carpet.

State and local crime scene technicians seized several items found on scene, which were submitted to a state forensic laboratory for analysis, including human hair samples, the victim's night shirt and robe, a towel, and trash from the wastebasket in the couple's bathroom. However, due to crime scene investigative limitations testified to by the state's crime scene technician, fingerprints were <u>not</u> lifted from any areas in the house probably touched by the perpetrator(s) in the commission of this crime, including door knobs, the stair

railing, stair wall, many pieces of furniture, and numerous other items found disturbed in the house.

Sheriff investigators testified that they looked around the grounds surrounding the house, but had observed nothing of evidentiary value. However, Laycock testified he noticed tire tracks that morning leading from the house lawn through a hay field toward a distant side gate from the farm to a State road. Laycock further testified that he was familiar with the Evans-Smith farm and its crops and said that it would have been unlikely for Evans-Smith, a part-time farmer, to drive through this hay field. Cook also saw these suspicious tracks and believed she had mentioned it to the police at the scene that day.

Evans-Smith was advised of his wife's murder the afternoon of April 15, 1985, by Loudoun County sheriff investigators Jeff Brown and Jay Merchant at his office on upper Wisconsin Avenue, Washington, D.C. Upon being told his wife was dead, investigators said he asked several questions: whether she was raped, disfigured, clothed, and who found her. Brown testified that the Petitioner was showing some emotion of crying, but there were no tears in his eyes. Investigators testified that when they mentioned the appearance of a burglary, Evans-Smith gasped, "Oh my God, the van." He further mentioned a European wallet with ten $20.00 bills in it and hay sales money.

Evans-Smith told them that he had gotten up that morning a few minutes before 5:00 a.m., as was his custom and

that around 5:15 a.m. or 5:20 a.m. had driven down to the mail box at the entrance gate of the farm to get the morning Washington Post newspaper. When he was turning the car around, the beam of his headlights momentarily reflected off the windshield of a dark colored van that was parked on Route 725. He told investigators he returned to the house with the newspaper, which he left on the hood of the truck in the garage, and went out to feed their livestock. He then said he came back and joined his wife for a light breakfast of toast and coffee. After breakfast, Evans-Smith said he left his wife at the kitchen table reading the newspaper, went upstairs, showered, and dressed for work. When he came downstairs his wife was still at the kitchen table and she asked him to sign a birthday card

for their son-in-law, which he did. Investigators testified that at a later interview the Petitioner further related to them that his wife observed blood stains on his shirt sleeve. He said she washed the blood out of the sleeve while the Petitioner put a Band-Aid on his hand. Petitioner further told the investigators that he kissed his wife good-bye, and as he was drove out of the driveway, she waived good-bye to him from the upstairs bedroom window where she had gone to get their son-in-law's address out of an address book for the birthday card. There was testimony from a friend of the Evans-Smiths and from Cook that Petitioner, while relating the events of that morning to them, said his wife had waived good-bye to him from the kitchen window.

Petitioner said that he left for work no later than 6:30 a.m. and arrived at work, the Foreign Area Studies Department of The American University in Washington, D.C., at his normal time. He said that he had briefly stopped by the main campus of The American University just about 8:00 a.m. the morning of April 15, 1985, to drop off copies of a new book for the University's president, but the office was closed. He related that traffic was heavy on his way to work April 15, 1985, and that his route included the Washington Beltway (I-495) and the Cabin John (American Legion) Bridge, which at that time was undergoing major modifications. Concerning rush hour conditions the morning of April 15, Commonwealth witnesses involved with traffic oversight on the route in question testified there

were no unusual traffic delays that Monday morning, but that traffic was stop and go and unpredictable from day to day on this route. There was no evidence presented as to the time it would have taken to drive this route under comparable circumstances.

After notifying Petitioner of his wife's death, the investigators testified that he declined their offer to drive him home. Driving his own car, they followed him. Having been told by Brown and Merchant that he would not be able to go to his house, he first drove to his daughter's (Cook) house. After a brief visit with her, Petitioner drove to his farm and waited at the entrance gate. During his long wait, Petitioner made numerous requests to sheriff deputies and investigators to allow him to go up to the house to see his wife and was told that he

would be allowed to do so after the police finished their investigation. Witnesses testified that Petitioner became increasingly irritated as time passed and his requests were ignored, resulting in a highly emotional and physical encounter between him and two deputies. During the scuffle, one deputy noticed Petitioner biting his hand and that he was bleeding.

Sheriff deputies prevented Evans-Smith from returning to his home until late that evening. Upon arriving at the house, Petitioner was confronted by investigator Merchant, who asked him to accompany him through the house to indicate what items were missing. Petitioner cooperated. After proceeding through the house, Merchant asked him to prepare a list of things he thought were missing, once Petitioner's was given a list of what the

evidence technicians had taken. On the following day and the second following day, the Petitioner called the sheriff's office without success for the inventory.

Brown and Merchant scheduled a meeting with Evans-Smith on April 17, 1985, representing that they would give him the inventory of items taken from the house. The meeting turned into an extended interrogation of the Petitioner, during which he repeated much of the information previously provided them. The investigators testified that he mentioned for the first time that his wife kept her heirlooms, valuable jewelry, and their hay receipts in an aqua colored jewel box in her bedroom. It was later determined that this jewel box was not one of the items seized by the crime scene investigators, and it was found, approximately two weeks

later by a farm worker in the Evans-Smiths' corn field near the access gate to which vehicle tracks led from the house yard.

At the conclusion of the April 17, 1985, interrogation, Evans-Smith was strip searched and examined by Dr. Michael E. Solin, a county medical examiner, and pictures were taken of his body. This examination revealed four parallel scratch marks on the backside of Petitioner's upper arm and some scratches on the backs of his hands. The Petitioner told investigators that he had not realized his upper arm was scratched and told them he had been clearing the fence rows on their farm of thorny locust and wild rose bushes the Saturday before the murder.

Solin testified that the scratches on Petitioner's hands were not consistent

with fingernail scratches, but that those on the Petitioner's upper arm could have been caused by fingernails, including in his opinion the fingernails of the victim. Contrary conclusions were drawn by two other expert witnesses, who testified for the prosecution: Loudoun County Medical Examiner George T. Hocker and Deputy Chief Medical Examiner of the Virginia Office of the Chief Medical Examiner Dr. James C. Byer, both of whom testified that the scratches on the Petitioner's hands and arm were made by a very sharp object such as a thorn, and further described the victim's fingernails as incapable of inflicting such scratches due to the way they were closely manicured.

The forensic evaluation of blood, hair, and fibers revealed that hair samples were collected on only three of

the 13 wooden stair steps to the upper floor bedrooms (steps 5, 8, and 11). State forensic expert Deanna Dabbs reported that of the 14 hairs found on the stairs three were found consistent with the victim (one of which was forcibly removed), 10 were unidentifiable because they were gray (one of which was forcibly removed), **and one blond head hair was found belonging to neither the victim nor the Petitioner**. None of the hairs found on the steps was identified as consistent with the Petitioner's hair type. The blond head hair was found on the eighth step with one gray hair and one of the victim's hairs.

Dabbs testified that 59 other individual hair samples were analyzed from the victim's bedroom. Of those 59 samples, 39 were consistent with the

victim's hair type and seven with Petitioner's. Most unusual, however, was the recovery of one brown caucasian head hair from the victim's left hand, which belonged to neither the victim nor the Petitioner and five hair samples taken from the victim's pubic combings which tested dissimilar in certain aspects to the victim's hair type but which clearly were not the Petitioner's.

The brown caucasian head hair was taken from the paper evidence bag which had enclosed the victim's left hand. The crime scene technician who enclosed the hand in this evidence bag testified that its purpose was to retain evidence therein. He further testified that the victim's hand was closed when the bag was placed around it, indicating that the hair had been contained within the closed hand

and excluding the possibility of it having arrived there from someone who may have entered her room after her murder. This was the same hand Dr. Byer testified was used by the victim in an attempt to release the panty hose ligature, causing the deep gouges found on her throat.

NONE of the samples in evidence of Petitioner's hair was determined by Dabbs to have been forcibly removed.

At trial Petitioner's defense focused on others having murdered his wife, particularly a couple of suspicious individuals who were at the adjacent farm the morning of the murder. The defense introduced evidence from a neighbor of the Evans-Smiths, who lived opposite the entrance to their driveway, who testified that she recollected hearing and seeing a dark colored vehicle hurriedly departing

the Evans-Smiths' driveway the morning of the murder between 9:00 a.m. and 11:00 a.m. The car stopped at the entrance way and the occupant got out at the farm gate, walked around some, got back into their vehicle and quickly drove away.

Petitioner himself had told investigators of his seeing a suspicious van parked on Route 725 early the morning of the murder. Additionally, a citizen named Tracy Dillon testified that she had reported to the sheriff's office a strange encounter with a speeding dark colored van with two passengers with Louisiana plates about 8:30 a.m. the morning of the murder, a short distance from the Evans-Smiths' farm.

The morning following the murder (April 16, 1985), investigator Merchant had conducted a road check at the Evans-

Smith's entrance gate on Route 725 between the hours of 4:00 a.m. and 8:30 a.m., stopping and interviewing some 22 passers-by. **The Commonwealth presented eight witnesses at both trials, who testified that they passed Evans-Smiths' entrance gate on Route 725 between the hours of 4:00 a.m. and 8:00 a.m. on the morning of April 15, 1985, but saw no van or anything else unusual on the road that morning.**

What the Commonwealth did not reveal is that one of the parties stopped during the very same road check, one Karen Spalding, did report seeing something unusual.

At the hearing on Evans-Smith's petition for a Writ of Habeas Corpus held January 12, 1993, Spalding testified (App. 84L-102L and 114L-119L) that **she told Merchant that she had seen someone walking**

on the Route 725 just prior to the Evans-Smith's entrance gate towards Lincoln, the day before the road check. She testified the person was wearing jeans, a jean jacket, white T-shirt, and blondish-brown hair. He wasn't carrying anything, and she believed he had his head down. She further testified that it was unusual to see anyone on that road because it was very rural. In corroboration of her testimony, Spalding's husband testified that she had reported to him about the road check and her call to Merchant, and he specifically remembered her telling him about seeing the man on the road the day of the murder. (App. 102L-114L).

In the letter opinion of February 1, 1993, the trial court after hearing evidence upon the Petitioner's Writ of Habeas Corpus, made the following Findings

of Fact in regard to the Spalding report (App. 8C-13C):

> "As a part of the investigation of the murder, Merchant conducted a "road check" on Route 725 near the Evans-Smith farm early on the morning of Tuesday, April 16, 1985. At the time Merchant knew that Barbara had been murdered in the residence on the farm the previous day (April 15, 1985), and had been told by Dr. George Hocker, the Loudoun County Medical Examiner, that he estimated her time of death to have been 6:00 to 6:30 a.m. give or take one to two hours. Merchant arrived for the "road check" at about 4:30 A.M. and stayed until about 8:30 A.M.
>
> "During the 'road check' Merchant stopped every vehicle to determine if anyone saw or heard anything at the time the murder occurred. He stopped a total of 22 vehicles, and he made notes concerning each vehicle he stopped. The notes were made in a spiral bound notebook. He made notes at the time he spoke to the occupants of each vehicle he stopped. He identified the notebook at the hearing, but the notebook itself was not admitted into evidence.
>
> "Karen Spalding and her family were living in April 1985 at a house on route 725 a short distance east of the Evans-Smith farm. The Spalding

family was living there temporarily while their fire damaged house near Purcellville was being repaired. Spalding's daughter attended Lincoln Elementary School in Lincoln, Virginia which is west of the Evans-Smith farm.

"The morning of April 16, 1985 Spalding was driving her daughter to school when she was stopped on Route 725 near the Evans-Smith property by Merchant. She was headed west on Route 725 toward Lincoln Elementary School when she was stopped at 7:36 A.M. He asked and obtained from Spalding her name, address and telephone number. He asked her how often she travelled Route 725 and on what days. She told him that she usually came by about 8:00 A.M. taking her daughter to school. He told her that there had been a murder and asked if she had seen or heard anything. She replied negatively. He gave her his card and asked her to call him if she knew anything. Merchant made contemporaneous notes of his stops of Spalding (Respondent's Exhibit 2).

"Spalding worked in McLean, Virginia in April 1985. She proceeded to work after dropping off her daughter at school. She had to be at work by 9:00 A.M. Sometime after the stop, but the same day, Spalding remembered having seen someone walking on Route 725 near the Evans-Smith farm. Later the same day

[April 16, 1985] Merchant returned the call to her.

"In the telephone conversation Spalding told Merchant that on the previous Thursday or Friday she saw a person walking on Route 725 toward Lincoln near the Evans-Smith farm at about 8:00 A.M. She told him that it was a white male wearing a jean jacket, jeans and a baseball hat. She said he was in his late 20's or early 30's and had a reddish-brown beard. Merchant told her that someone would get back in touch with her, but no one ever did. Merchant made contemporaneous notes of this conversation (Respondent's Exhibit 4).[2]

"Merchant made his notes of both the stop and telephone conversation in the same notebook. He had notes of all 22 vehicle stops of which Spalding's stop was the tenth. On the next page of the notebook after the notes of the twenty-second stop are Merchant's notes of his telephone conversation with Spalding.

"Although Spalding talked with her husband the evening of April 16, 1985 about these events, she did not discuss them with anyone other than

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[2] The factual conclusions stated in this paragraph are contested by the testimony presented by Karen Spalding and her husband. (App. 84L-119L).

> him until May 1992. In November 1991 Spalding went to work for the law firm of David H. Moyes, one of the attorneys who had represented Evans-Smith at trial. In May 1992 during a discussion with a co-worker at the law firm Spalding mentioned the events of April 16, 1985. As a result, this information was provided to present counsel for the Petitioner and led to the filing of this habeas petition.
>
> "Spalding does not know Blair D. Howard, the other attorney who represented the Petitioner at trial, and she does not know the Petitioner."

Upon these factual findings and the underlying discovery history in the criminal trial, the trial court found the Spalding evidence exculpatory. The trial court, however, erroneously applying the United States v. Bagley, supra, "reasonable probability" standard of materiality found that, based upon the jury's position regarding other exculpatory evidence, there was not a reasonable probability that this evidence

would have altered the result of the trial.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S CONVICTION VIOLATED THE DUE PROCESS CLAUSE BECAUSE THE EXCULPATORY EVIDENCE SUPPRESSED BY THE PROSECUTION WAS CONSTITUTIONALLY MATERIAL UNDER THE HARMLESS ERROR STANDARD OF GIGLIO V. UNITED STATES, 405 U.S. 150 (1972); NAPUE V. ILLINOIS, 360 U.S. 264 (1959), MOONEY V. HOLOHAN, 294 U.S. 103 (1935).

Where there has been a deliberate misrepresentation of evidence to a jury and court in a criminal case, as opposed to a simple omission of exculpatory evidence, the constitutional test to determine the materiality of the suppressed evidence is not the standard of United States v. Bagley, 473 U.S. 667 (1985)[3] but the harmless error standard

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[3] The materiality test developed for the Bagley set of circumstances is whether there is a "reasonable probability" that had the suppressed evidence "been

developed in the Mooney v. Holohan, 294 U.S. 103 (1935), line of cases, i.e. whether the Spalding evidence **"could in any reasonable likelihood have affected the judgment of the jury."** [Emphasis Added.] Giglio v. United States, 405 U.S. 150, 154 (1972); See also U.S. v. Mele, 462 F.2d 918 (2nd Cir. 1972); Miller v. Pate, 386 U.S. 2 (1967); Napue v. Illinois, 360 U.S. 264 (1959); and Mooney v. Holohan, supra. Cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982) (prosecution deported defense witness).

The Petitioner asserts that the Supreme Court of Virginia erred by not requiring the trial court to evaluate the

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disclosed to the defense, the result of the trial would have been different." Bagley, supra.

Spalding evidence as to his guilt against this standard.

In the flagship case of Mooney v. Holohan, supra, this Court established that the Due Process:

> "...requirement, in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. [citations omitted]. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing **if state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of the court and jury by the presentation of testimony known to be perjured.** Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." [Emphasis Added.] Id. 294 U.S. at 112.

The underlying rationale of Mooney was later elaborated upon in Brady v. Maryland, 373 U.S. 83, 87-88:

> "The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.... **A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile'...."** [Emphasis Added.]

In the 1959 case of Napue v. Illinois, supra 360 U.S. at 271, the "reasonable likelihood" test of materiality was crafted, which test has since been applied in cases where a deliberate misrepresentation has been made to the court and jury.

The reasoning underlying the standard is well explained in the 1972 decision of

the United States Court of Appeals for the Second Circuit in the case of U.S. v. Mele, supra at 924:

> "...Due process requires...that a different rule be applied when prosecutorial suppression has caused the evidence not to be presented at trial. **At least where the suppression is deliberate, the defendants need only to show that the evidence is material and could in any reasonable likelihood have led to a different result on retrial.** Giglio v. United States, 405 U.S. 150, 154, 92 S.t. 763. [Citations omitted]. In these cases, where there has been a considered decision to suppress and where the value of the information 'could not have escaped the prosecutor's attention,' United States v. Keogh, supra, at 147, it is not necessary to engage in any exact determination of the degree of prejudice to the defendants." [Emphasis added].

Even in its opinion in United States v. Bagley, supra 473 U.S. at 679, this Court recognized that it was not replacing the "reasonable likelihood" standard of review with the "reasonable probability" test. In fact this Court elaborated that:

> "The Supreme Court has stated that this standard [i.e. reasonable likelihood standard] is equivalent to the "harmless beyond a reasonable doubt" standard established in Chapman v. California, 386 U.S. 18, 24 (1967)." Id.

The evidence presented to the trial court as reflected in the record before this Court is that: (1) defense counsel **specifically requested the exculpatory information**; (2) the first trial court **ordered that exculpatory evidence would be reviewed in camera**; (3) the Commonwealth misrepresented [orally and in writing] to both the court and defense counsel **that it had released "all" witness statements to the Court for in camera review**; and (4) the Commonwealth **presented misleading testimony at trial of eight individuals,**[4]

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[4] At both trials, the Commonwealth presented testimony of the following eight witnesses: Keith Dennis, Lawrence Robey, Ralph Clarke, Mark Simms, Bill Packard, Samuel Brown, Bart F. Johnston, III, and

including five interviewed in the April 16, 1985, road check, who saw no suspicious vehicles or persons to prove "beyond a reasonable doubt" that Evans-Smith murdered his wife.

The use of this evidence, without the disclosure of Spalding's report to Merchant and consequently Spalding's actual observations, effectuated a deliberate misrepresentation to the Court and jury of the truth.[5]

James Anderberg to establish a chain of evidence eliminating other suspects, and in particular to impeach the Petitioner's sighting of a van parked on Route 725 early the morning of the murder. All testified seeing no van or horse trailer on the road that morning and none of them testified to seeing anything else of importance on their way down that road the morning of the murder or any other time in close proximity thereto.

[5] By virtue of the following statement in its letter opinion of February 2, 1993, the trial court recognized the deliberateness of the prosecution's suppression (App. 32C-33C):

At both trials, the Petitioner denied any role in his wife's death, and the defense brought out as best it could evidence of others who were in a position to commit the murder. Spalding's evidence would have in fact connected a suspect directly to the crime scene, which suspect

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"... this court cannot just merely look away from the circumstances of the nondisclosure when it considers the importance of the Evans-Smith prosecution, the severity of the offense, the defense's theory at trial, the continuing protestation of innocence by Evans-Smith, the rulings of Judge Penn before the first trial as to other information he deemed exculpatory and the involvement of an experienced prosecutor and investigator. In its first written discovery response the Commonwealth even stated that it would present all witness statements to the Court for in camera inspection, but obviously it did not do so. **Considering the pre-trial circumstances of this case, it is very difficult to understand the failure to produce Spalding's statements to the defense."** [Emphasis Added].

had not been previously identified as being in the vicinity of the crime scene.[6] Consequently, the Petitioner asserts that under a proper materiality test, the suppression of the Spalding evidence amounted to a constitutional deprivation of his right to due process.

The tenuousness of Evans-Smith's conviction as a result of this unconstitutional suppression is reflected in the observations of the Virginia Court of Appeals in its reversal of Petitioner's first conviction, where it was observed

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[6] At the underlying criminal trial, defense counsel had brought out evidence of two Mexican/American horse trainers who were at the adjacent farm within the time frame of the murder, who gave contradictory testimony as to their whereabouts and activities the morning of the murder. However, the forensic testimony at the second trial eliminated these two individuals from being the caucasian person or persons who left the hairs found at the crime scene.

that the totality of the evidence of his guilt was "not so overwhelming as to establish the guilt of the accused beyond a reasonable doubt...." so as to justify the improper use of hearsay as harmless error. [Emphasis Added.] Evans-Smith v. Commonwealth, supra, 361 S.E.2d at 445. Petitioner's second trial contained neither additional nor substantively different evidence of Petitioner's guilt than the first.

II. PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE CONSTITUTIONALLY MATERIAL EXCULPATORY EVIDENCE, SUPPRESSED BY THE PROSECUTION, WAS NOT AVAILABLE TO THE JURY TO WEIGH AS TO THE ISSUE OF PETITIONER'S PUNISHMENT. BRADY V. MARYLAND, 373 U.S. 83 (1963).

In Virginia, a criminal defendant is entitled to two decisions on his sentence, one by the jury and one by the judge. Vines v. Muncy, 553 F.2d 342 (4th Cir.), cert. den., 434 U.S. 851 (1977). The jury

sets the maximum sentence, and the trial judge has only the power to suspend all or part of that sentence.

Due process requires that when exculpatory evidence has been suppressed by the prosecution, the reviewing court must determine materiality of the suppressed evidence as to punishment as well as guilt. Petitioner asserts that the Supreme Court of Virginia erred by not requiring the trial court to evaluate the Spalding evidence in that light, and to do so against the harmless error standard of Giglio v. United States, supra. Petitioner contends that the Spalding evidence at the very least might have created a residual doubt as to Petitioner's guilt, and therefore affected the jury's position on sentencing.

In Brady v. Maryland, supra, the Maryland Court of Appeals had denied an appeal on the issue of suppression of exculpatory evidence regarding the guilt of Brady, but had remanded the case to be evaluated upon the effect the suppressed evidence could have upon the jury's imposition of punishment. This Court upon review of the decision affirmed, ruling that:

> "...the suppression by the prosecution of evidence favorable to an accused **upon request violates due process where the evidence is material either to guilt or to punishment** irrespective of the good faith or bad faith of the prosecution." [Emphasis Added.] Id. 373 U.S. 87.

Although the trial court in Petitioner's cause stated this premise in its letter opinion, it did not address the issue of punishment in its opinion. (App. 22C-23C).

In Evans-Smith's case, the jury in the first trial set his sentence at the minimum of five years. The jury in the second trial set his sentence at the maximum of 20 years.[7] Because the case against the Petitioner was entirely circumstantial and both juries imposed, upon essentially the same evidence, very different sentences, there is a reasonable likelihood that Spalding's testimony could have had an effect upon the jury's ultimate determination of punishment, even

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[7] The constitutionality of the imposition of the harsher sentence on retrial was challenged by direct appeal by Evans-Smith under the premise of North Carolina v. Pearce, 395 U.S. 711 (1969). However, the Virginia Court of Appeals denied said appeal, ruling that as a "jury sentencing" state, the Pearce rule does not apply by virtue of Chaffin v. Stynchcombe, 412 U.S. 17 (1973). Evans-Smith v. Commonwealth, Record No. 1268-89-4 (Va. App. June 1, 1990), aff'd Virginia Supreme Court (Record No. 901018, September 14, 1990).

if it may not have affected the jury's finding of guilt.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Virginia entered in the above-entitled proceeding.

Respectfully submitted,
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October, 1993 TERM